SECOND READING SPEECH

Crimes (Miscellaneous Amendments) Bill 2013

Mr Speaker, this Bill makes a number of amendments to the *Criminal Code* and the *Justices Act* to streamline and update the criminal law.

The changes include the insertion of new "carjacking" offences, a new general fraud offence and a requirement for a defendant to disclose to the prosecution before trial a notice of admissible opinion evidence upon which he or she intends to rely.

I will now explain the more significant amendments in the order in which they appear in the Bill, beginning with the amendments made to the *Criminal Code.*

Repeal of section 92

The Council of Chief Justices established some years ago a committee called the "Harmonisation of Rules Committee". Its long-standing brief is to standardise the rules of practice and procedure in all the Australian Superior Courts.

The committee has drafted common rules concerning litigation funders. Litigation funders are companies which provide the funding towards running civil cases in return for a proportion of the damages recovered and they are often used in class actions where few of the individual plaintiffs would otherwise be in a position to fund the action.

Professional funders of litigation are common in other jurisdictions but not common in Tasmania possibly because section 92 of the *Code* makes 'maintenance' (i.e. financial support) of another in the conduct of legal proceedings a crime. It is no longer a crime in any other Australian jurisdiction.

Some years ago the former Chief justice requested the removal of section 92 to allow the adoption in Tasmania of the common rules relating to litigation funders. This Bill makes that amendment.

Amendment to Section 150

This section is amended to make it clear that the duty to take precautions and due care in the management of anything that may endanger human life extends to an animal. This will clarify that the section may be used to prosecute a person in control of a dog that causes serious injury and death because of a lack of care or precaution in its management.

Carjacking

Section 240, which deals with robbery, armed robbery and aggravated robbery, may not be applicable in a situation where an offender has assaulted a person in order to use that person's motor vehicle or takes the vehicle when an innocent person, for example a sleeping child, is in the vehicle.

The difficulty arises because section 240 requires the offender to "steal" the vehicle, that is, intend to permanently deprive the owner of the vehicle, but these crimes may occur when the offender wishes to use the vehicle for a short-term "joy-ride" or to temporarily evade detection.

While the summary offence of motor vehicle stealing does not require an intention to permanently deprive the owner and could be used to charge an offender, the theft of a car by force, or the abduction (even if inadvertent) of an innocent person during the course of the offence is a serious matter which should be indictable.

This Bill addresses the issue by inserting new offences of carjacking and aggravated carjacking, based on section 154C of the New South Wales *Crimes Act 1900* into the *Code.*

Fraud

Section 297(1)(d) creates the crime of conspiring to cheat or defraud the public, or any particular person, or class of persons.

However, no crime of fraud currently exists, instead there are a series of specific offences like 'fraudulently misrepresenting status', 'fraudulently using stamps' or 'personation' (which is defrauding by impersonating another person).

There are slight but important differences between the elements of each offence, meaning that an error in choosing which charge to prefer may result in a failure of the prosecution.

In addition, the technical nature of the differences in the charges leads to difficult and confusing instructions to juries.

To overcome these problems, this Bill inserts a general offence of fraud into the Code, based on the offence in the Western Australian *Criminal Code* where it has operated for several years without any significant problems. Existing Western Australian authorities may be of use in interpretation of the new section.

New "alternative conviction" offences

The Code provides that in certain circumstances a person charged with one offence may be convicted of another similar offence instead of the one charged, provided that the evidence establishes that the alternative offence has been committed.

The Code provides that an offence of reckless driving under section 32(1) of the *Traffic Act 1925* is available as an alternative conviction for the crimes of 'manslaughter' (s.334(d)) and 'causing grievous bodily harm by dangerous driving' (s.334B).

However, that alternative offence is not available for the crime of 'causing death by dangerous driving' (section167A of the Code). This Bill amends section 334C to allow a defendant to be convicted of the offence of reckless driving under section 32(1) of the *Traffic Act 1925* as an alternative to causing death by dangerous driving.

Section 337B provides for several alternative convictions available on a charge of maintaining a sexual relationship with a young person (section 125A of the Code), including sexual intercourse with a young person under the age of 17 years, rape, indecent assault, incest etc.

However, an offence under section 125B of the Code, 'indecent act with a young person' is not currently available as an alternative conviction. This Bill amends section 337B to allow a person charged with maintaining a sexual relationship with a young person to be alternatively found guilty of an indecent act with a young person.

The Bill also inserts a new provision in section 338(1) so that a person charged with a range of dishonesty offences may alternatively be convicted of the new fraud offence.

Amendment to section 350

Section 350 contains provisions concerning the discharge of proceedings before verdict, and requires a Crown Law Officer to inform the court if the Crown will not be proceeding with an indictment.

While this is usually done in writing and filed before the trial begins, there are situations where this information needs to be given during the trial. This creates a problem, especially when the Court is sitting in Burnie or Launceston, as not all persons appearing for the Crown are Crown Law Officers. The Bill amends the section so that any person appearing for the Crown can inform the Court that the Crown will not be proceeding.

Admissible Opinion evidence

The Director of Public Prosecutions noted in his 2006-07 Annual Report that there had been a rise in 'mental state' defences – that is, defences

based on admissible opinion evidence of mental health issues leading to questions of fitness to plead and insanity.

The accused person in a criminal trial is presently able to withhold admissible opinion evidence of his or her mental state until it is adduced and is not required to submit to any evaluation by a relevant expert appointed by the Crown.

This creates a situation where the Crown is unable to prepare an appropriate response to such evidence, and it appears unfair when compared the heavy and extensive burden of pre-trial disclosure the Crown bears.

In civil cases fairness requires admissible opinion evidence be disclosed to the other side before trial so that it can seek its own expert advice and, if there is a difference of opinion, prepare and present admissible opinion evidence of its own.

In addition, a plaintiff in a civil action who claims damages for a tort-caused medical condition, whether mental or physical, submits to and cooperates in the opposing party's medical expert's examination of the condition.

The Director of Public Prosecutions has therefore requested that there be an amendment to the Code to require that a defendant give notice to the prosecution of an intention to rely on admissible opinion evidence.

While the request particularly singled out "mental state" evidence, there is no logical reason why one category of admissible opinion evidence should be treated differently. While it is likely that it will be predominantly admissible opinion evidence of the defendant's mental state that will be sought to be adduced in a criminal trial, it is conceivable that a defendant may wish to adduce other types of admissible opinion evidence, for example in relation to blood spatter, firearms etc.

In all cases it would expedite the trial if the prosecution were aware before the trial commenced that admissible opinion evidence was going

to be led by the defence so that it is not surprised at trial but can seek its own expert advice and, if necessary, prepare and present its own admissible opinion evidence. This is what occurs in a civil trial.

If the admissible opinion evidence is to be led by the defence to argue that the *Criminal Justice (Mental Impairment) Act 1999* (which provides for procedures for dealing with persons who are unfit to stand trial or who may be subject to a special hearing) applies, the prosecution should equally be given notice of the evidence in order to prepare an appropriate response.

Western Australia, Victoria, Queensland and South Australia all require advance notice to the prosecution of any admissible opinion evidence intended to be adduced at trial.

This Bill amends the Code to insert a new section 368B to provide that a defendant who intends to adduce admissible opinion evidence must give notice of this to the Crown.

The new section also provides that if the defence proposes to adduce psychiatric or other admissible opinion evidence of his or her medical condition the prosecutor may apply to the court for an order that the defendant submit to an examination by an independent expert at the prosecution's expense.

The new section provides for time limits for the giving of a notice of evidence and the potential consequences of failing to comply with the requirements of the section.

The court or judge has discretion whether or not to allow admissible opinion evidence to be adduced if there has been non-compliance with the section.

The Bill also makes a consequential amendment to subsection 331B(2) to require a judge to warn a defendant of the requirements of section 368B.

Amendments to section 402 – Determination of Appeals

In a 2009 case his Honour Justice Porter made comments to the effect that section 402(4A) was strangely drafted and may not actually achieve its stated purpose of preventing the court taking into account that the person was to be sentenced again for the same offence ("double jeopardy") in determining what sentence to impose.

Subsequently the Chief Justice requested an amendment to the subsection so that it more clearly expresses its original intention. This Bill substitutes subsection (4A) and inserts a new subsection (4B) to make the necessary clarification.

The Chief Justice also requested that section 402 be amended to include a provision to allow the Court of Criminal Appeal to remit the resentencing of an offender to the court of trial after an appeal has been determined rather than have the Court of Criminal Appeal determining the new penalty. The Bill inserts new subsections (4C) and (4D) to make this amendment.

Amendment to section 409

A Crown appeal against acquittal or sentence may result in the respondent being ordered to stand trial again, or being re-sentenced.

It is almost an invariable rule that a criminal trial in the first instance would take place with the accused person present for the trial and the sentencing.

The Chief Justice has advised that the judges are of the view that the same principle should apply to an appeal where the status or liberty of a respondent is in some way threatened.

In the past the Court has been inconvenienced by having to adjourn an appeal and asking the respondent's counsel to ensure the respondent's attendance on the next occasion.

The Chief Justice has therefore requested an amendment to section 409 to provide an express power to the court to require a person convicted or a respondent to a prosecution appeal to attend the hearing of an appeal and/or the handing down of the decision. This Bill makes the necessary amendments.

Additional crime where arrest may be made without warrant

The Bill includes the crime of indecent assault in Appendix A, which lists crimes where an arrest can be made without a warrant.

Amendments to the *Justices Act 1959*

"Double jeopardy" principles have been cited by the courts in relation to prosecution appeals against sentence. The "double jeopardy" refers to the fact that a convicted person is facing being sentenced for a second time for the same offence.

Even where a prosecution appeal against sentence is successful "double jeopardy" considerations have sometimes resulted in an Appeal Court not imposing a new sentence or discounting the substituted sentence. If sentences that have been accepted by appeal courts as inadequate remain uncorrected, this may have a tendency to lower sentencing tariffs and persons convicted of crimes may be able to escape appropriate punishment.

The Council of Australian Government's Working Group on double jeopardy recommended in 2007 that all jurisdictions should implement reforms to provide that when a court is considering a prosecution appeal against sentence, no principle of "sentencing double jeopardy" should be taken into consideration by the court when determining whether to exercise its discretion to impose a different sentence or in determining what sentence to impose.

In 2008 the *Criminal Code Act 1924* was amended to include section 402(4A) to give effect to this recommendation. At the time that

amendment was made, it was not considered necessary to amend Part XI (Motions to review, appeals and similar proceedings) of the *Justices Act 1959*.

However, in 2010 his Honour Justice Blow published reasons for his decision in *McCullough v Bailey,* a motion made by the prosecution to review a sentencing order on the grounds the sentence was inadequate. In the course of his reasons Justice Blow cited two interstate authorities both of which refer to "the element of double jeopardy that is involved in such appeals".

In order to ensure consistency in the treatment of prosecution appeals against sentence, whether from the lower court or the Criminal Court, this Bill amends the *Justices Act 1959* to ensure that the mere fact that a person may be sentenced again for the same offence is not taken into account.